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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-233

~~No. 1777~~

ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC.,
Petitioners,

vs.

INTERNATIONAL INDUSTRIES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

Commencing with their statement of the Questions Presented (Pet., p. 2) and continuing throughout their brief, petitioners have raised issues which were not before either the District Court or the Court of Appeals for the

Eighth Circuit and have thereby sought to raise issues well beyond the very narrow question presented here. The sole issue, which is pertinent here, before the District Court and the Court of Appeals was whether under 15 U.S.C. §16 a preliminary injunction would issue to prevent a franchisor from recovering possession of a restaurant where the franchisee was in default in the payment of obligations to the franchisor and where such defaults would give the franchisor the right to possession. The question here is whether, under 28 U.S.C. §1254(1), some special and important reason has been shown for this Court to review on certiorari the decision of the Court of Appeals. For the sake of putting the issues into proper perspective, we think it appropriate to consider the posture of this case as it has developed.

Petitioners' complaint purports to charge a diversity of violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (15 U.S.C. §§1, 2, 14). Taking the most liberal construction of the complaint, the alleged violations fall into the following categories:

(1) Alleged tying arrangements in connection with the purchase or lease of (a) restaurant furniture, fixtures and equipment; (b) restaurant foodstuffs and supplies; (c) advertising; (d) insurance; (e) management services (A. 12).

(2) Alleged horizontal price-fixing by conspiracy between respondents (as purchasers of foodstuffs and supplies) and certain unnamed and unidentified suppliers (as sellers of foodstuffs and supplies) (A. 13).

(3) Vertical resale price maintenance (A. 13).

(4) Alleged violation of Section 2 of the Sherman Act by monopolization of the market for family-type restaurants (A. 12).

(5) Alleged violation of the antitrust laws of the State of Missouri (A. 19).

With specific reference to petitioners' contentions respecting eviction, which is the sole issue raised here, the complaint in paragraph 23(f) contains the following allegation:

> "That defendants required said franchisees, including plaintiffs to agree to arbitration of all disputes in Los Angeles, California, with the proviso that defendants may evict franchisees to recover possession of their restaurant premises by means of legal process without resort to arbitration proceedings." (A. 13).

The complaint in paragraph 28, in part, alleges the following:

> ". . . . The right reserved by defendants to summarily evict plaintiffs and to arbitrate all disputes between the parties are parts and parcels of a scheme designed to aid defendants' action and participation in a combination and conspiracy in restraint of trade and commerce." (A. 18).

Paragraph 34, in part, alleges:

> "Defendants use and intend to use summary eviction and arbitration procedures to perpetuate their scheme and actions in restraint of trade in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as aforesaid." (A. 20-21).

As conceded on brief by petitioners (Court of Appeals Brief of Appellants, pp. 12-13), petitioners are substantially indebted to respondents (herein sometimes, "International") in an amount exceeding $87,000 (as of March 31, 1969) for sums due under each of the following categories of indebtedness:

(1) Unpaid balance of principal and interest on promissory note of Robert J. Helfenbein ("Helfenbein") given to acquire the franchise (Ex. 1, p. 2; A. 61);

(2) Unpaid and past due amounts on equipment lease executed by Helfenbein covering equipment used by him in the restaurant in Kansas City, Missouri (Ex. 1-D; A. 61);

(3) Unpaid and past due amounts for goods sold and delivered to Helfenbein and used by him at the Kansas City restaurant;

(4) Unpaid and past due management service fee (based on 5.2% of gross sales) as provided for under the License Agreement executed by Helfenbein (Ex. 1-B; A. 61).

(5) Unpaid and past due advertising fees (based on 1% of gross sales) provided for under the License Agreement executed by Helfenbein.

Petitioners filed a motion, pursuant to Section 16 of the Clayton Act (15 U.S.C. §26), seeking a preliminary injunction, first, to enjoin International from exercising its arbitration rights (there being no dispute that the licensing documents entered into between the parties evidenced "a transaction involving commerce," and that portion of the License Agreement providing for arbitration of all disputes, under 9 U.S.C. §2 was "valid, irrevocable, and enforceable") and, second, to prohibit International from seeking to evict petitioners from the restaurants in Des Moines, Iowa, and Kansas City, Missouri.

At a hearing before the United States District Court for the Western District of Missouri on April 9, 1969, petitioners presented their "evidence" which consisted solely of the oral arguments of counsel, two affidavits and certain other exhibits which are contained in Appellants' Ex-

hibits (as filed by petitioners with the United States Court of Appeals for the Eighth Circuit). The District Court, upon consideration of the "evidence" presented to it, together with the briefs of the parties, relying upon this Court's decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), held that neither arbitration nor unlawful detainer as contemplated by International constituted conduct rendered unlawful under the antitrust laws. This was the decision of the District Court (App. C) based upon reflection and study and not upon the off-the-bench (and unsupportable) comment said by petitioners to be the trial court's "finding" of a substantial likelihood of success by petitioners on the merits (Pet., p. 6).

The Court of Appeals affirmed the District Court's decision and found ". . . there is no attempt in either the arbitration or eviction proceedings to enforce the very conduct (that is, the tie-in sale) prohibited by the Clayton or Sherman Act." (App. A, p. A5).

Petitioners' motion for a preliminary injunction both before the trial court and the Court of Appeals was based *solely* upon Section 16 of the Clayton Act and did not, as petitioners suggest (Pet., p. 4), rely upon the Court's general equitable powers.

Neither the District Court nor the Court of Appeals distinguished between arbitration and eviction in applying the *Kelly* case. The application of its principles was held to be the same whether applied to International's proposed unlawful detainer action or to pursuit of its pending claim for arbitration seeking an award for amounts owed by petitioners to International. Fatally inconsistent, therefore, is petitioners' abandonment of its challenge to International's effort to pursue arbitration (Pet., p. 5). Acquiescence in that part of the Eighth Circuit's opinion holding

that arbitration was permissible, necessarily involves acquiescence in that part of its opinion approving, under the principles of the *Kelly* case, the institution of unlawful detainer by International.

Petitioners' claim (Pet., pp. 6-7) that overcharges by International caused petitioners to be unable to honor their financial obligations flies in the face of the findings of the Court of Appeals. On the issue of the supposed "overcharges", the Court of Appeals initially observed:

> "There is no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement. The essence of plaintiffs' complaint is that the state court action arises from their failure to pay for what they have received." (App. A, p. A6).

In overruling petitioners' motion for rehearing, the Court of Appeals further stated:

> "Plaintiffs' original complaint (paragraph No. 33) demonstrates that their initial refusal to pay for rent, franchise payments, goods and services received arises from many other factors. It is obvious that plaintiffs early attempted to coercively use its refusal to pay past due accounts in order to preemptorily relieve themselves of the alleged tie-in requirements. To now allow plaintiffs to pay conditional on the grant of an injunction would make this court a party to that coercion. This we refuse to do." (App. B, p. A8).

The "unrebutted evidence" referred to by petitioners (Pet., p. 7) of overcharges and inability to pay obligations consists of affidavits by Robert J. Helfenbein and his accountant, Mathew T. Kearney (Exs. 1, 2; A. 61-62), neither of which was or now is entitled to serious consideration.

The Helfenbein affidavit (Ex. 1) is replete with "beliefs", conclusions and speculations, none of which is sup-

ported by competent evidence. Essentially this affidavit sets forth a series of arguments, claims and allegations. It alleges that prices charged to Helfenbein were higher than charges made by competing suppliers. In this respect the affidavit does not refer to any competent evidence of claimed overcharges but, rather, to a summary of purported overcharges prepared by Helfenbein's accountant, Kearney (Ex. 2; A. 62). The Helfenbein affidavit ties into these overcharges by stating that "[s]ome of the figures were *estimated* with my help" (Ex. 1, p. 3). Helfenbein then elaborates upon those "estimated" overcharges and concludes with the allegation that he was financially unable to meet his obligations. The Kearney affidavit, in turn, shows that it was made at the behest, not only of Mr. Helfenbein, but also of Mark J. Klein, one of petitioners' attorneys, who was active in its preparation. The Kearney affidavit shows that most of the background material for the preparation of the estimates came from "counsel for plaintiffs". In fact, the Kearney affidavit states:

> "The theory of computing the overcharge estimates is based upon opinion of counsel for plaintiffs. Since the figures used are based upon unaudited books and records and upon estimates, I accordingly cannot express an opinion on them." (Ex. 2, pp. 1-2).

Thus we have a round-robin series of allegations, charges and estimates emanating principally from counsel for petitioners and ending with Kearney who candidly states in his affidavit that he will not express an opinion as to those speculations and conclusions.

Irrespective of the various excuses for nonpayment of the various items, the fact remains that the indebtedness owed as of March 31, 1969, totaled some $87,200 (Court of Appeals Brief of Appellants, p. 12).

Finally (Pet., p. 7), petitioners make reference to the fact that the Helfenbein restaurant is now prospering and set forth a summary of exhibits which purport to reflect this prosperity. Although this is easily understandable in light of the fact that Helfenbein does not pay his bills and obligations, we take note of this comment for yet another reason.

Petitioners refer at the end of page 7 (and also on page 5) to a series of new exhibits (Exs. 16 through 29) which have been separately furnished by petitioners to this Court. None of the exhibits shown as numbers 16 through 29 was before either the District Court or the Court of Appeals. None of these supposed "exhibits" constitutes a part of the record of this case on application for writ of certiorari. To be candid, we were startled at receiving and later reading extensive argument and comment in petitioners' brief with respect to these new exhibits. Petitioners have failed to cite any authority for enlarging the record of this case for their petition, and we know of none which would offer any support for this audacious and presumptuous practice. The case may not be considered on petition on any record different from that on which it was originally submitted to the District Court. E.g., Rule 12, U.S. Sup. Ct. Rules. Parenthetically, we note, however, that many of the new exhibits would have been objectionable even had they been initially presented to the trial court.

We make, however, one comment with respect to Exhibit 27 which purports to be a copy of an existing complaint in a case which was filed in the Superior Court of the State of California in and for the County of Los Angeles and titled, *Beckstead, et al.* v. *International Industries, Inc., et al.*, No. 993376. We are filing with this Court a copy of the Clerk's Docket Sheet, attested to by him which shows

that, on May 28, 1971, the complaint in *Beckstead* was dismissed on demurrer. We make this comment in view of the extensive discussion of *Beckstead* by petitioners (Pet., pp. 15-17), and petitioners' failure to advise this Court of the dismissal of the *Beckstead* complaint.

We know of no good reason why we should dignify or recognize this practice by commenting further upon the considerable portions of the brief devoted to an exposition of these new exhibits. Throughout this brief, therefore, we will deal with the case on the basis of the record as it was reviewed by the Court of Appeals and will not further comment upon the new exhibits (16-29) which are discussed, commencing on page 7 of petitioners' brief and which thereafter make up the entire basis and subject matter of the text of petitioners' brief, with minor exceptions, from pages 9 through 17.

ARGUMENT

I.

Petitioners Have Failed to Establish a Conflict with Decisions of This Court or of Any of the Courts of Appeal Because Petitioners' Motion for a Preliminary Injunction Was Properly Denied in That the Remedy of Unlawful Detainer Is Not in Furtherance of Alleged Violations of the Antitrust Laws.

Petitioners have failed to set forth that specific part of Rule 19 of this Court on which they rely. We take it that petitioners' main contention is that the decision of the Eighth Circuit in this case in some manner conflicts with certain decisions of this Court, including *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947) and *Kelly* v. *Kosuga, supra.* We are unable to determine the precise nature of petitioners' contention in this regard. On pages 17 and 18, petitioners lead us to believe that they

do not question the validity of those decisions, but merely their application to the facts of this case (no effort is made, however, to distinguish *Bruce's Juices* or *Kelly* from the facts of this case). Yet, on page 19, petitioners tell us that they seek a "clarification" by this Court of its decisions in *Bruce's Juices* and *Kelly* to "eliminate the harshness and inequities of such decisions . . . ." Finally, on page 24, petitioners tell us ". . . the courts below require guidance from this Court on methods of achieving fair and just results in litigation arising out of such terminations." These latter two statements lead us to believe that petitioners, *sub silento*, are claiming that this Court erred in its decisions in *Bruce's Juices* and *Kelly*.

Even assuming that petitioners do not question the validity of those decisions, their contention is somewhat difficult to grasp. On page 18 petitioners tell us that they are not "in any way relying upon the Federal antitrust laws to avoid payment of any indebtedness . . . ." Petitioners tell us that their reliance is on state laws but, as petitioners themselves recognize, ". . . that is entirely irrelevant to the issue." Then petitioners tell us that their main position is that the merits of their claims (which are antitrust claims) "are so integrated" with the merits of International's eviction action "that it is inequitable and unjust to require Helfenbein to defend an entirely independent action in state courts in order to save his business." The latter position necessarily conflicts with the former, and makes it difficult to know which position is in fact relied upon. We will, however, discuss our understanding of the *Kelly* and *Bruce's Juices* cases and what we submit is the severability of the claims of International for nonpayment of the various items specified from any antitrust issue which petitioners have raised.

Second, with specific reference to Rule 19, we take it that petitioners claim that the decision of the Eighth Circuit conflicts with other decisions of this Court and, further, with decisions of other courts of appeal. We gather that this is the tenor and purpose of the petitioners' discussion on pages 21 to 23 of their brief.

With these preliminary observations in mind, we will discuss the issues relevant to Rule 19 *seriatim*.

A.

In View of the Substantial Indebtedness Owed by Petitioners to International, International, under the Kelly Doctrine, Is Entitled to Proceed with Appropriate State Remedies to Secure Possession of Its Restaurant Premises in Kansas City, Missouri.

The indebtedness of petitioners arises in the various categories specified above and under the terms of the various contractual agreements between the parties. The basic agreement between the parties is the License Agreement and the franchising program arising from that agreement (Ex. 1-B; A. 61). From this License Agreement there flows a sublease of the restaurant premises at 6501 Troost Avenue in Kansas City, Missouri (Ex. 1-F; A. 61). This is a separate contractual obligation and transaction. Additionally, the parties have executed a separate lease of restaurant equipment (Ex. 1-D; A. 61). There is a separate promissory note (on which principal and interest is unpaid), collateral and ancillary to the License Agreement for the Kansas City restaurant. Respondents' claim for amounts owing on account of goods sold and delivered is wholly collateral to the License Agreement. The amounts due respondents for management service fees, advertising fees are for amounts already past due and, hence, are

wholly collateral and severable from the License Agreement.

We think that *Kelly* v. *Kosuga, supra,* is decisive in permitting respondents to maintain appropriate state remedies to recover possession of the Kansas City restaurant premises.

In that case, when sued for the balance of the purchase price, Kelly pleaded, as do petitioners here (A. 18) that the contract was part of a scheme in violation of the Sherman Act. According to defendant's affirmative defense in *Kelly*, plaintiffs had approximately 600 carloads of onions stored in the Chicago area and another 400 around the country. In a series of meetings, plaintiffs made known to Kelly and other onion growers that these onions would be sold in such a manner as to depress both the futures and cash market price unless the defendant and other growers would purchase a part of plaintiffs' onions. Defendant's purchase was part of an agreement whereby 287 carloads of onions were purchased in return for plaintiffs' promise not to place onions on the futures market for the balance of the 1955-1956 trading season.

The defendant in *Kelly,* as do petitioners here (Pet., p. 18), relied upon *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.,* 212 U.S. 227 (1909), in support of his contention that the defense of illegality should be allowed whenever the contract in question contains terms violative of the Sherman Act. *Continental* was before this Court on a demurrer which made certain admissions deemed fatal by the Court:

> "It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with

effect of both restraining and monopolizing trade and commerce among the several States." (l.c. 261). [Emphasis in original].

This Court in *Kelly* explained *Continental* as holding that enforcement of contracts would be refused only when the judgment of the Court would itself be enforcing the precise conduct rendered unlawful by the Act. "The scope of the defense of illegality under the Sherman Act goes no further." (358 U.S. at 520). This Court in *Kelly* further stated:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' . . . Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation . . . is avoided by treating the defense as so confined." (358 U.S. at 520-521).

With specific reference to a private antitrust action, rather than reflecting the desired status of a private class of attorneys general urged by petitioners on page 18, this Court stated:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general." (358 U.S. at 520).

This Court in *Kelly* essentially relied on its previous decision in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), where the Court held that the fact that the plaintiff was an illegal trust in restraint of trade did not constitute a defense to an action for the price of goods sold and delivered.

Further authority for the *Kelly* decision was *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165 (1915). Corn Products sold merchandise to Wilder with the standing offer to give Wilder a rebate if it bought exclusively from it. There this Court stated:

> ". . . it results not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but on the contrary that the provisions of the act add cogency to the principles of general law on the subject and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view. . . ." (l.c. 176).

In *Kelly*, this Court found the sale to be an intelligible economic transaction separate from any illegal act, so that it was not necessary to supply any judicial sanction, especially in terms of a defense not provided for in the Sherman Act. It was made clear that the avoidance of private contracts as an indirect judicial remedy under the Sherman Act is very limited in scope so that creation of "a very strange class of private attorneys general" could thus be avoided.

Petitioners seek to avoid the decisive holding of *Kelly* by the following contention:

> "Helfenbein's contention is and was that International's claims for furnished goods and services and their claims for unfurnished services are inseverable for purposes of determining whether or not International should be enjoined from evicting Helfenbein from the Kansas City restaurant." (Pet., p. 21).

Essentially, petitioners would seek this Court to ignore the separateness of the documents and transactions and debts

involved and to ignore the cogent analysis of separateness expressed in the view of Justice Holmes who, in his dissent in the *Continental* case, stated:

> "It is said that the specific sales, the general agreement and the original combination all are steps in one illegal plan, and that the plan gives character to the whole. But we must be more precise. . . . The plaintiff's unlawful purpose did not make it unlawful to buy the plaintiff's goods." (212 U.S. at 270).

Petitioners attempt the same sort of imprecise characterization by alleging that the assertion of their rights by respondents under state is "parts and parcels of a scheme" in violation of the antitrust laws. This, then, must be the basis for petitioners' argument as to the supposed inseverability of the indebtedness from the antitrust issues. We submit that this simply will not do.

In this case there is no dispute that Helfenbein executed the License Agreement. Nor is there any dispute that he executed a promissory note in connection with the License Agreement, on which there is a substantial amount of principal and interest remaining unpaid. He concedes this in his affidavit (Ex. 1, p. 2; A. 61). Amounts due under the lease of equipment and the promissory note are all collateral to and severable from the License Agreement. Certainly respondents should not be precluded from asserting their claims under state law for the unlawful detention of the restaurant premises because of nonpayment of the various items referred to in the contract documents. All of these matters are separate transactions, none of which is illegal in and of itself. Nor does the mere characterization by petitioners of these transactions as being parts of an alleged scheme in violation of the antitrust laws make them illegal.

The petitioners tell us here that their principal allegation concerns certain alleged tying agreements (Pet., p. 4). As to this contention, insofar as unlawful detainer is concerned, the Eighth Circuit found that there is ". . . no evidence that the eviction proceeding is based upon plaintiff's refusal to continue to buy according to any tie-in agreement." (App. A, p. A6).

The amounts due for the management service fee and advertising fees are severable from the License Agreement because the respondents seek amounts which are already due and payable and not amounts to become due in the future. We submit that there is no difference between a claim for a past due account for goods sold and delivered, as in *Kelly* (and here), and a claim for past due account for management and advertising services already rendered.

In short, there is simply nothing in the evidence to support petitioners' contention that the purpose of the unlawful detainer proceeding is to oust Helfenbein from the restaurant ". . . because of his express inability and unwillingness to abide by International's tying agreements." (Pet., p. 13). In fact there is an express finding to the contrary.

Because the antitrust laws provide their own sanctions to deter conduct alleged to be in restraint of trade, we submit that the rationale of *Kelly* clearly means that the illegality defense now asserted by petitioners is not essential to the promotion of competition and should not be permitted except under the very narrow ground where the precise conduct rendered unlawful by the act would be enforced. In short, we submit that the Eighth Circuit did not fail properly to apply the *Kelly* doctrine.

The *Kelly* doctrine was presaged by this Court's decision in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947). There the question was whether renewal notes representing the purchase price of cans sold were uncollectible if it was found that the vendor had violated the Robinson-Patman Act. As to each note, the plaintiff, a canner, pleaded "the consideration for said notes is illegal and said notes void and of no force and effect," because plaintiff sold to others at prices which discriminated against the purchaser. This Court, for purposes of its decisional analysis only in *Bruce's Juices*, assumed that the defense was established. The "sole question we decide is whether notes given for purchase are unenforceable if the quantity discount violates the Act." In refusing to allow the defense, this Court stated:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. . . . Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. . . . This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress." (l.c. 750).

The same sort of attempt to link intelligibly distinct economic transactions with contracts alleged to be in violation of the antitrust laws, as petitioners do here, was before the Court of Appeals in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F.2d 29 (7th Cir. 1959). That was a declaratory judgment action brought by certain Culligan dealers to require Culligan to recognize the validity of its dealership franchise agreements entered into with various plaintiffs. Culligan sought to cancel its franchise agreements and to substitute new agreements on

the grounds that (1) the agreements were in violation of Section 3 of the Clayton Act, and (2) the illegal provisions invalidated the entire contract. In rejecting these contentions, quite similar to those advanced by petitioners here, the Court of Appeals stated:

> "We interpret the current view of the Supreme Court to be that a defense based on violation of Section 3 of the Clayton Act is valid if the contract at issue is intrinsically illegal; that is—if the Court, by its judgment, would be enforcing the specific conduct prohibited by the Act. But such is not the case in the franchise agreements we are considering in the case at bar. We note again that all exclusive dealing contracts are not violative of Section 3 of the Clayton Act. Furthermore, plaintiffs are not asking the Court to enforce the exclusive dealing provisions of the agreements. As stated in Kelly v. Kosuga . . . the contract need not be condemned '* * * though it furnished the occasion for a restrictive agreement of the sort here in question.'" (l.c. 34).

Petitioners have advanced a series of additional arguments in an attempt to avoid the *Kelly* doctrine. First, petitioners claim that they were "overcharged for such goods and services." (Pet., p. 6). From this petitioners argue their inability to operate the restaurant profitably, and pay International (Pet., p. 7). This is later expanded into a claim (rejected by the Eighth Circuit) that such nonpayment occurred because of "the overcharges arising out of the illegal tying arrangements." (Pet., p. 21). Finally, petitioners claim their ability to litigate this matter will be hindered in the event unlawful detainer is allowed to proceed in the Missouri courts (Pet., p. 22).

These contentions are quite similar to those raised in *Orville Shoaf* v. *Triangle Publications, Inc.*, 1967 *Trade Cases*, ¶72,251 (E.D.Pa. 1967), where the plaintiff alleged violations of Sections 1 and 2 of the Sherman Act. De-

fendant counterclaimed and moved for summary judgment on his counterclaim which alleged that plaintiff owed defendant $3,142.57 on open account for newspapers sold and delivered. Plaintiff defended his nonpayment on the ground that the debt incurred was the result of defendant's resale price maintenance policy which established such excessive prices that the defendant was unable to pay the bills. In rejecting this contention, the Court stated:

> "*Kelly* controls the outcome of the case at bar. Plaintiff purchased the defendant's newspapers at the price charged all other dealers of his class. Even if, as the plaintiff alleges, the contract for the purchase of papers furnished the occasion for restrictive resale practices of the defendant, this court under the *Kelly* doctrine must enforce the contract since it is a completely separate claim for money owing on goods purchased . . . ."

B.

Petitioners Have Made No Showing of Any Conflict with Decisions of This Court or Any Courts of Appeals.

The final argument advanced by petitioners to avoid the import of the *Kelly* doctrine is that appearing on pages 21 and 22 of their brief. There petitioners suggest that the decision of the Eighth Circuit is in conflict with a series of cases (not discussed by petitioners in any way) but merely collectively cited under subdivision (a) [(Pet., p. 22)], which hold, so petitioners tell us, ". . . that the use of otherwise legal site control provisions in contracts is an illegal means of effecting anticompetitive results." We submit that none of these cases is pertinent to the case at bar and none of them shows that the various items of indebtedness are in any way tied up with the various antitrust claims advanced by petitioners.

Petitioners do not tell us in what way the cases cited on page 22 are in conflict with the Eighth Circuit's decision. We are left completely to speculation to determine any supposed conflict. Petitioners themselves suggest one distinction in that, in each of the cases, liability had been established and the issue was damages and not the propriety of the issuance of a temporary injunction. Although petitioners have not discussed any of these cases, to demonstrate the insubstantiality of petitioners' argument, we will discuss each *seriatim*.

The first case cited is *Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223 (1968). That case presumably is cited for the proposition that what petitioners term, "legal site control", becomes illegal when it is a "means of effecting anticompetitive results." The *Texaco* case was one of the continuing line of TBA cases which delineated practices peculiar to the petroleum distribution industry. The case was not one between private parties under Section 3 of the Clayton Act or Section 1 of the Sherman Act but was maintained by the Federal Trade Commission under Section 5 of the Trade Commission Act. An obvious distinction between this case and *Texaco* is the focus of this Court in *Texaco* upon Texaco's "dominant economic power." Thus, the Court stated:

> "It is against the background of this dominant economic power over the dealers that the sales-commission arrangement must be viewed." (l.c. 227).

There is no evidence in our case that the unlawful detainer action to recover the restaurant premises is the type of pressure tactic dealt with in *Texaco* to enforce illegal conduct. We deal here with a situation where the petitioners admittedly are substantially in arrears in the payment of monies owed which entitles respondents to pursue the remedy (i.e., unlawful detainer) available to regain possession of their premises.

In *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), plaintiff had asserted that he had been coerced into a lease of the retail outlet conditioned upon his acceptance of defendant's unlawful resale price maintenance policy carried out through a so-called "consignment" agreement. It was alleged that the lease itself was used as the vehicle ". . . . to police the retail prices charged by the consignees, renewals not being made if the conditions prescribed by the company are not met." (l.c. 14-15). Quite opposite to the finding of the Eighth Circuit in the present case that the eviction proceeding is not based upon petitioners' refusal to abide by the alleged tie-in arrangement was the express finding in *Simpson* that:

> "Solely because Simpson sold gasoline below the fixed price, Union Oil refused to renew the lease . . . ." (l.c. 15).

Thus this Court indicated that the lease and consignment arrangement violated the antitrust laws because these two agreements were used coercively to impose noncompetitive prices. There is no finding, nor evidence, in the present case that eviction is premised upon anything other than nonpayment of various items of indebtedness admittedly owed by petitioners to respondents. Nor is there any finding here that the eviction is being used coercively to enforce any program in violation of the antitrust laws or in retaliation for petitioners' refusal to abide by any program in violation of the antitrust laws.

Petitioners next cite *Sahm* v. *V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968), which is similarly inapposite. *Sahm*, like *Simpson*, involved a lease of a retail gasoline service station coupled with an oral agreement providing for consignment of gasoline to be retailed at prices set by the defendant. When plaintiff raised his price above that set by the defendant, defendant, through its sales man-

ager, protested the price increase and threatened cancellation of the lease. Later, plaintiff was advised by defendant's sales manager that termination of the lease could be prevented if plaintiff would abide by the resale price maintenance program. As in *Simpson*, the Court found that the resale price maintenance agreement was enforced by a related lease, the termination of which was used coercively to enforce the resale price maintenance agreement. As stated, there is and can be no similar finding in the present case.

The final case cited by petitioners under subdivision (a) is *Lessig* v. *Tidewater Oil Company*, 327 F.2d 459 (9th Cir. 1964). *Lessig* also involved certain practices of the gasoline distribution industry. Following a termination by Tidewater of its service station lease with Lessig, Lessig filed suit claiming violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, alleging that Tidewater had imposed unlawful tying arrangements. There was ample evidence not only of the existence of tying arrangements, but also ample evidence of Tidewater's market dominance in the imposition of such arrangements. For example, Tidewater sold gasoline in 32 states and had 6.5% of the total gasoline sales in eight western states. The Court of Appeals, in reversing judgment for Tidewater, also found that there was evidence of resale price maintenance by Tidewater and that plaintiff had been terminated because of his failure to adhere to resale prices. The case was remanded because of the trial court's failure to instruct the jury that Lessig could offer evidence of lost profits in determining losses and damages for cancellation of the lease. Contrary to petitioners' contention here, the Court in *Lessig* concluded (and Lessig did not so contend) that the tying arrangements had not led to the cancellation of the lease. Rather

than support petitioners' position, as to the injunction, *Lessig* is authority for the proposition that damages (rather than a preliminary injunction) is an adequate remedy for cancellation of a dealership.

None of the cases cited by petitioners under their subsection (a) on page 22 of their petition casts doubt upon the validity either of *Kelly* or of *Bruce's Juices,* nor upon the applicability of those cases here. Again petitioners have not attempted to tell us in what way the four cases cited conflict with the holding of the Eighth Circuit in the present case. And in fact, an examination of those cases does not support any contrary conclusion. There is no finding in our case that termination by an unlawful detainer action of petitioners' possession of the restaurant premises is used either coercively or in retaliation for petitioners' refusal to abide by alleged tying arrangements. To the contrary, there is an express finding that there is ". . . no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement." (App. A, p. A6).

Earlier in their petition (Pet., p. 16), petitioners cited an additional Court of Appeals case, presumably arguing that the Eighth Circuit's decision is in conflict with it. That is *Bergen Drug Company* v. *Parke, Davis & Company,* 307 F.2d 725 (3d Cir. 1962). That case has been cited by petitioners in support of Helfenbein's claim ". . . that his efforts to prosecute anti-trust damages would be intentionally frustrated if International would be permitted to pursue its eviction action in state court . . . ." (Pet., p. 16). In that action a wholesaler commenced an antitrust action against Parke, Davis for treble damages and a permanent injunction and filed a motion for an injunction pendente lite requesting that defendant be enjoined from cancelling plaintiff and from refusing to fill its orders and to

continue to sell as before. The District Court held that there was no statutory basis for the injunction and denied the motion. The Court of Appeals held that the District Court, under its general equity powers, could have granted such an injunction and relied upon *Bateman* v. *Ford Motor Company*, 302 F.2d 63 (3d Cir. 1962), in support. (This is also a case upon which petitioners rely on page 4.)

Contrary to the present case, *Bergen* was not brought under Section 16 of the Clayton Act, but rather under the general equity powers of the Court. The *Bateman* case cited by the Court in *Bergen* was a Dealer's Day in Court Act case wherein, in order to show that an injunction should issue, all that was needed to be shown was that a substantial dispute existed as to whether the dealer was cancelled in good faith. Where the very issue to be litigated in such cases is the good faith of the manufacturer in cancelling the dealer, a much lesser standard can be applied with respect to whether the dealer should be kept in possession of his store pending trial on the good faith cancellation issue. In *Bergen*, Parke, Davis had conceded that it had terminated plaintiff out of resentment and because of his filing of the antitrust action. There is no such finding in our case. A similar finding was made in *Bergen* where the Court found:

> "The undisputed facts here are that the buyer-seller relationship was discontinued because of the filing of the main action." (l.c. 727).

But in our case there is no evidence of any kind that International seeks to bring unlawful detainer for any reason other than to regain possession of the premises because of nonpayment for goods sold and delivered, services rendered, equipment rented and past due principal and interest on a promissory note. Also quite contrary to our case is the finding in *Bergen* that defendant had failed to claim

that a preliminary injunction would be oppressive. The contrary has been the claim of International in this case.

Petitioners then cite, again without any discussion, three cases under their subparagraph (b) on page 22. Apparently these cases are cited for the proposition that ". . . it is normally sufficient to prove that the defendant materially contributed to plaintiff's injury . . . ." (Pet., p. 22). We have been unable to ascertain in what way the proposition for which these cases are cited relates to the present case. We have read these three cases, and none seems relevant. We are not aware of any standard of causation that is in issue in this case that is discussed in these three cases. We have not been enlightened by petitioners as to the relevance of these cases to the present one. We do not believe that we are required to speculate or to attempt to construct arguments for the petitioners from which they themselves defer.

Finally, petitioners have cited three cases (Pet., p 13), apparently in support of petitioners' desire to have a "clarification" of this Court's decisions in *Bruce's Juices* and *Kelly*. Petitioners' argument in this respect is premised upon petitioners' contention that eviction is sought here ". . . because of [Helfenbein's] express inability and unwillingness to abide by International's tying agreements." (Pet., p. 13). The evidence in this case, as we have said before, is that there is no retaliatory or coercive motive involved in the action by International in seeking to evict Helfenbein from the restaurant. The Court of Appeals expressly has found to the contrary and has found that there is no relationship between any alleged tying agreement and the unlawful detainer action. Undisputed by petitioners is the fact of their substantial indebtedness arising in five categories.

The findings in our case starkly contrast with those in each of the three cases cited by petitioners on page 13.

In *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), there was an express finding that the notice to quit was given to plaintiff "in retaliation for her complaints to the housing authorities" of violations of the District of Columbia building codes (l.c. 688-689).

In *Javins* v. *First National Realty Corporation*, 428 F.2d 1071 (D.C. Cir. 1970), plaintiffs offered to prove the existence of approximately 1,500 violations of the Housing Regulations of the District of Columbia. The Court held that the tenant's obligation was dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. Thus the Court stated:

> "In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty." (l.c. 1082).

In *Schweiger* v. *Superior Court of Alameda County*, 90 Cal. Rptr. 729, 476 P.2d 97 (Cal. 1970), there was a finding that the landlord's rent increase and eviction action had been intended as retaliation against the petitioner for asserting his statutory rights. As delineated by the California court, the case involved the resolution of an apparent conflict between certain sections of the California code dealing with rights of landlords and tenants.

Even a brief recitation of the facts and holdings of these three cases demonstrates their inapplicability to this case where petitioners, contrary to the holdings of this Court in *Kelly* and *Bruce's Juices*, are attempting to assert violations of the Federal Antitrust Laws as a defense to an action based upon nonpayment of items of indebtedness admittedly owed.

CONCLUSION

We submit that the Court of Appeals and District Court correctly decided this case upon the basis of this Court's decisions in *Kelly* and *Bruce's Juices*. We submit that this decision is not in conflict with any of the decisions of this Court or with those of the Courts of Appeal in the various cases cited in petitioners' brief. We do not believe that the petitioners have established the existence of any of the considerations delineated under Rule 19 of this Court for the granting of a writ of certiorari. We, therefore, respectfully request that this Court deny petitioners' petition for a writ of certiorari.

Respectfully submitted,

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